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IN THE

Supreme Court of the United States

October Term, 1961.

NUMBER 433

CAMERON IRON WORKS, INC.,
Petitioner,

v.

LODGE NO. 12, DISTRICT NO. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LODGE NO. 12, DISTRICT NO. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 27, 1961 (R. 66, App. 1),* with petition for rehearing denied on July 28, 1961 (R. 94), which modifies the judgment of the District Court (R. 35) by deleting the portion thereof denying court compelled arbitration of the money damage claims of fifteen discharged strikers. The opinion and judgment of the Court of Appeals judicially compels the arbitration denied by the District Court of such money damage claims in a suit by the collective bargaining repre-

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* R. refers to the Transcript of Record and App. refers to the Appendix to this Petition.

sentative of the discharged strikers under Section 301 of the Labor-Management Relations Act.

Opinions Below

The District Court's opinion (R. 27) holding the issue of reinstatement of the discharged strikers to be arbitrable and the issue of money damages claimed by the discharged strikers not to be arbitrable under the collective bargaining agreement between the petitioner employer and the respondent union is reported as *Lodge No. 12, District No. 37, International Association of Machinists* v. *Cameron Iron Works, Inc.*, 183 F. Supp. 144 (S.D. Tex. 1960). The opinion of the Court of Appeals here sought to be reviewed, which ordered arbitration of the money damage issue denied by the District Court, is reported as *Lodge No. 12, District No. 37, International Association of Machinists* v. *Cameron Iron Works, Inc.*, ... F. 2d ....., 48 L.R.R.M. 2516 (5th Cir., 1961). Such opinion is contained in the Appendix hereto (App. 3a, R. 54).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on June 27, 1961 (App. 1, R. 66). The petition for rehearing of Appellee (now Petitioner) was denied by an order dated and entered July 28, 1961 (R. 94). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Should the court compel arbitration of the money damage actions of fifteen discharged strikers, terminated by Petitioner for union activity consisting of alleged strike misconduct, under a collective bargaining agreement containing no provision for money damages and no provision

governing the conduct of the parties during a strike but containing a particular prohibition against supplementing its terms in arbitration and a specific reservation vesting exclusively in the Company all rights not expressly relinquished?

2. Did the Court of Appeals err in holding claims for money damages by discharged strikers to be arbitrable because there is no express provision in the collective bargaining agreement between Petitioner and Respondent excluding claims for money damages from arbitration despite the fact that the collective bargaining agreement specifically denies the arbitrator any authority to "supplement the terms of" the collective bargaining agreement and particularly provides that *all* rights "not herein expressly relinquished are vested exclusively in the Company"?

3. Does the mere fact that the written grievances of discharged strikers contained claims for money damages render the claims arbitrable when such grievances invoke no contract provision for interpretation or application as the basis for money damage awards and the collective bargaining agreement between Petitioner and Respondent contains none?

4. Did the Court of Appeals correctly delegate to the arbitrator the determination of "whether the award of back pay is or is not within the terms of the agreement" between Petitioner and Respondent which contains no provision vesting the determination of arbitrability in the arbitrator?

5. Did the Court of Appeals err in refusing to follow its own recent decision in the case of *Refinery Employees Union of Lake Charles Area* v. *Continental Oil Co.* in which the United States Supreme Court denied writ of certiorari on November 16, 1959?

Statutes Involved

Petitioner is being judicially compelled to arbitrate money damage actions on behalf of fifteen strikers discharged for union activity, i.e., alleged strike misconduct, under claimed authority of Section 301 of the Labor-Management Relations Act, 29 U.S.C., Section 185 (61 Stat. 156):

> "(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Such money damage claims seek recovery for alleged actions by the Petitioner as employer which would constitute unfair labor practices under 29 U.S.C., Section 158 (61 Stat. 140), which provides as follows:

> "(a). It shall be an unfair labor practice for an employer —
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> • • •
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization • • •.
>
> • • •"

29 U.S.C., Section 157 (61 Stat. 140), stating the rights of the discharged strikers which Petitioner was prohibited from interfering with by 29 U.S.C. 158 is as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title."

The statute vesting peculiarly if not exclusively in the National Labor Relations Board the jurisdiction and responsibility of fashioning money damage awards and other remedies to correct unfair labor practices is 29 U.S.C. 160 (61 Stat. 146), providing in part as follows:

> "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice, listed in Section 158 of this title, affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *".

Statement of the Case

Respondent sued Petitioner to compel the arbitration of grievances filed under the grievance and arbitration provisions of their union contract (R. 25-26, Articles IV and V) seeking reinstatement and back pay for fifteen former employees discharged by Petitioner for strike misconduct (R. 7-16). The suit is brought under and federal jurisdiction is based upon Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185 (61 Stat. 156). Petitioner denied that it had contracted to arbitrate any of these grievances (R. 16-23). After denying Respondent's Motion for Sum-

mary Judgment (R. 24), and following a trial on the merits, the District Court found that there was a contract obligation to arbitrate the issue of reinstatement of the discharged strikers but that there was no agreement to arbitrate their money damage claims based on lost time and pay (R. 27-34). Judgment was accordingly entered mandatorily enjoining Petitioner to arbitrate the issue of reinstatement of the fifteen discharged strikers but refusing judicially compelled arbitration of the issue of money damages for lost time and pay (R. 35-38). The District Court thereafter reaffirmed its judgment by denying Respondent's motion to alter and amend the judgment by ordering arbitration of the money damage claims (R. 38-48).

Early in the case Petitioner was granted a summary judgment on the ground that as a matter of law there was no contract obligation to arbitrate grievances arising during the course of a strike, which summary judgment was reversed on a prior appeal and the case remanded for trial on its merits. *Lodge No. 12, District No. 37, International Association of Machinists* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir., 1958), cert. den. 358 U.S. 880, 79 S. Ct. 120, 3 L.Ed. 2d 110.

Petitioner at the trial on the merits contested any arbitration of these grievances with evidence that in the negotiations leading to the settlement of the strike under a wage reopener* during which the discharges occurred Respondent repeatedly proposed and Petitioner repeatedly rejected a specific proposal that these discharges be adjudicated under the grievance procedure and arbitration provisions of the collective bargaining agreement, with the strike settlement

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* Section 2, Article XX of the union contract gave the right to reopen wage rates for negotiations on thirty days written notice and gave the union the right to strike on failure to reach agreement after sixty days (R. 25, p. 32).

agreement being thereafter executed by Respondent and Petitioner without any such provision (R. 13-15, 21). In addition to contending that this evidence established that it was not the intention of the parties that these strike discharge grievances should be arbitrable, the Petitioner further contended that the money damage claims were in any event not arbitrable under the terms of the collective bargaining agreement (R. 25-26).

With the three June 20, 1960, opinions of the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L.Ed. 2d 1409, 80 S. Ct. 1347; *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 4 L.Ed. 2d 1403, 80 S. Ct. 1343; and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L.Ed. 2d 1424, 80 S. Ct. 1358, before it when it considered Respondent's motion to alter or amend the final judgment by directing arbitration of the issue of pay for time lost, the motion having been specifically predicated on such three decisions, the District Court held them not to be governing as to such issue and reaffirmed that the issue of pay for time lost was not to be arbitrated (R. 38-48). Such holding was in clear obedience to the recent decision of the Fifth United States Court of Appeals directly governing the precise issue involved in *Refinery Employees Union of Lake Charles Area* v. *Continental Oil Co.*, 5 Cir., 1959, 268 F. 2d 447, cert. den. 361 U.S. 896, 80 S. Ct. 199, 4 L.Ed. 2d 152.

Refusing to follow its own decision in *Refinery Employees Union of Lake Charles Area* v. *Continental Oil Co.*, the Court of Appeals held that the three June 20, 1960, opinions of the Supreme Court in the United Steelworkers cases compelled it to order arbitration of the money damage claims (R. 54-65). It accordingly set aside that portion of the judgment of the District Court refusing arbitration of

the money damage claims (R. 65-66, 94). It so held despite the fact the fifteen employees were advised by Petitioner "that they were discharged for alleged misconduct in connection with the strike recently concluded" (R. 10); despite the fact that the 63 printed pages of the collective bargaining agreement between Respondent and Petitioner contain no provision whatever on money damages or money awards for lost time and pay and no provision whatever governing the actions and conduct of the parties or the employees during the course of a strike (R. 25-26); and despite the further fact that such collective bargaining agreement does contain an express provision which denies the arbitrator any authority to "*supplement* the terms of" such agreement and also contains an express provision that *all* rights "not herein expressly relinquished are vested exclusively in the Company" (R. 25-26, pp. 8 and 17 of the printed booklet).

In so holding the Court of Appeals not only made the language of the strikers' grievances rather than the language of the collective bargaining agreement determinative of whether the money damage claims are arbitrable but also effectively delegated to the arbitrator the adjudication of the issue of arbitrability without any contract provision having been invoked "the meaning, application or interpretation" of which is asserted to be determinative of the right to maintain money damage claims (R. 60).

Reasons for Granting the Writ

The decision of the Court of Appeals should be reviewed because each of the questions presented is an important point of federal law decided in conflict with decisions of other Courts of Appeal or in conflict with prior decisions of the Supreme Court on the same matter. Points One and Two will be argued together.

POINTS ONE AND TWO

I.

Compulsory Arbitration of Money Damage Claims Based Upon Strike Discharges Should be Refused Under a Union Contract Providing For Neither Money Damage Awards Nor Strike Regulation While Prohibiting the Arbitrator From Supplementing its Terms and Vesting Exclusively in the Employer all Rights not Expressly Relinquished.

II.

Absence of "Positive Declaration" Excluding Money Damage Claims Based Upon Strike Discharges From Arbitration is Insufficient Ground for Court Compelled Arbitration Under a Contract Prohibiting the Arbitrator from Supplementing its Terms and Vesting Exclusively in the Employer All Rights not Expressly Relinquished.

The Court of Appeals for the Fifth Circuit in this case has rendered a decision in conflict with recent decisions of the Courts of Appeals for the Second, Fourth, and Sixth Circuits and in conflict with its own recent decision in *Refinery Employees Union of Lake Charles Area* v. *Continental Oil Co.*, supra, by directing court-compelled arbitration under Section 301 of the Labor-Management Relations Act of the money damage claims of fifteen discharged strikers terminated by Petitioner for union activity (alleged strike misconduct) under a collective bargaining agreement between Petitioner and Respondent containing no provision for money damages and no provision governing the conduct of the parties or the employees during a strike but containing a particular prohibition against supplementing its terms in arbitration and a specific reservation vesting exclusively in the Petitioner all rights not expressly relinquished.

The Fifth Circuit Court of Appeals held in 1959 in the Continental Oil Company case that arbitration of money damage claims would not be judicially coerced in the absence of express provision in the collective bargaining agreement for their arbitration and this Court denied certiorari. The Fifth Circuit has now refused to follow its own recent prior decision on the ground that the three June, 1960, decisions of the Supreme Court in the United Steelworkers cases compel its decision to direct arbitration of money damage claims based upon unfair labor practices by the Petitioner.

The Second Circuit Court of Appeals in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers International, AFL-CIO*, 287 F. 2d 155 (1961) and the Sixth Circuit Court of Appeals in *Vulcan-Cincinnati, Inc.* v. *United Steelworkers of America, AFL-CIO*, 289 F. 2d 103 (1961) have each held that the three June 1960 Supreme Court opinions in the United Steelworkers cases had no such drastic and far-reaching effects and that money damage claims by employers arising out of strikes in breach of the collective bargaining agreements should be held non-arbitrable in the absence of express provisions for their arbitration.

The Fourth Circuit Court of Appeals has just recently held in *Textile Workers Union of America, AFL-CIO, Local Union No. 1386*, v. *American Thread Company*, ... F. 2d ...., 48 L.R.R.M. 2534 (1961) that the Steelworker trilogy of cases did not support enforcing an arbitration award reducing a discharge to a suspension and giving a money award equivalent to 90 days pay in the absence of express contract provision therefor and in the presence of contract provisions prohibiting the arbitrator from supplementing the agreement and vesting in the management all rights not expressly relinquished in the contract.

The conflict is on an important question of federal law which has not been, but should be, expressly settled by this Court. The challenged decision in the current case is a radical and dangerous extension of the three Steelworker decisions which is neither required nor supported by them.

The 63-page printed contract contains the most minute and detailed provisions specifically defining wages, hours and conditions of employment, and the relations between the parties, but it contains neither a provision concerning money damage awards nor any provision in any manner regulating the conduct of the parties and the employees during the strike under the wage reopening provision in the course of which these discharges occurred (R. 25, Section 2 of Article XX on p. 32). It does contain a provision on page 8 under Section 2 of Article V that the Board of Arbitration "shall have no authority to * * * supplement the terms of this agreement". It further contains a provision on page 17 under Section 3 of Article XII that "all other rights not herein expressly relinquished are vested exclusively in the Company". The Fifth Circuit opinion expressly refused to read the former provision "literally" and totally ignored the latter provision. It seemingly did so because it felt impelled to direct arbitration *despite the contract*.

Contractual provisions the same in substance were given an opposite effect by the Fourth Circuit in the recent *American Thread Company* case. There the collective bargaining agreement provided for the right of the employer "to discipline or discharge employees for just cause * * *; it is recognized further that *all rights heretofore exercised by or inherent in the Management*, and not expressly contracted away by the terms of this Agreement *are retained solely by the Management*". The arbitration article there covered "disputes, grievances, or disagreements involving applica-

tion or interpretation of this agreement * * *" but provided further:

> "The arbiter shall make *no award affecting a change, modification or addition to this Agreement and shall confine himself strictly to the facts submitted in the hearing, the evidence before him and the terms of the contract, including any amendments.* * * *"

Though finding the employee guilty of the offense for which he was discharged, the arbitrator reduced the discharge to a suspension and gave a money award equivalent to 90 days pay. In refusing to enforce the award, the Fourth Circuit Court held that the three Steelworkers decisions did not require it to ignore the quoted contract provisions, stating:

> "We are not persuaded that the Supreme Court, in recent cases involving arbitration and the right to enforcement of arbitration agreements, intended that the courts should permit an arbitrator to render decisions which do such violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties".

In giving full effect to contract provisions quite like those to which the Fifth Circuit gave no effect, the opinion further states:

> "The arbitrator found and declared that Arrowood was guilty of a serious offense. Implicit in this finding and his subsequent treatment of the case is the further finding that 'just cause' for disciplinary action was established. But the contract itself provided that he could make no award which would change, modify or add to the agreement; that 'all rights heretofore exercised by or inherent in the management,' and not expressly contracted away, were retained by management. The right to either discipline or discharge an employee for just cause, in the instant case for the

> failure of the employee to properly perform his job in accordance with company standards, was not, nor did the arbitrator find that it had been, expressly contracted away. It was a right, according to the evidence, theretofore exercised by management to discharge for the third failure to properly perform according to job requirements and standards."

The conflict between the decisions of the Fourth and Fifth Circuits in The American Thread Company and Cameron cases is apparent. As one law journal has put it: "The principles enunciated by the Supreme Court in the June 1960 Steelworkers' arbitration cases are diversely interpreted by the Fourth and Fifth Circuits". 30 LW 1007.

The Sixth Circuit likewise fully evaluated the three Steelworkers decisions in the *Vulcan-Cincinnati, Inc.* case and then declared at 289 F. 2d 107:

> "Although these cases extend the scope of arbitration, they adhere to certain well established principles. First, that no contracting party can be compelled to submit to arbitration any matter which he has not agreed to submit."

It then held that such cases do not "change our conclusion that in the case before us a violation of the no strike clause was not a matter to be submitted to arbitration."

The Second Circuit had previously reached an identical decision in an opinion handed down on February 17, 1961, in the *Drake Bakeries* case in which it held that arbitration would not be compelled of a money damage action based upon a slow down or work stoppage alleged to be in breach of the collective bargaining agreement but that whether the contract provision "has been breached by an interruption of work or a temporary walk-out should be decided by the court having jurisdiction of the action".

The scope of arbitration as defined in the Vulcan-

Cincinnati agreement and in the Drake Bakeries agreement is in each instance broader than in the Cameron agreement here involved. In Vulcan-Cincinnati, Inc. it covered not only "differences • • • between the Company and the Union as to the meaning or applications of the provisions of this Agreement" but also "any local trouble of any kind • • • in the plant" (289 F. 2d 104). The Drake Bakeries arbitration article covered not only "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract" but also "any act or conduct or relation between the parties hereto, directly or indirectly" (287 F. 2d 156). The Cameron contract is narrowed in its arbitration scope to "any difference • • • between the Company and any employee as to the meaning, application or interpretation of the provisions of this Agreement" (R. 25, Section 2 of Article IV at p. 4).

In reasoning that the Supreme Court did not intend to bring matters arising out of strikes within the scope of court compelled arbitration in the absence of express contract provision therefor, the opinion in the *Drake Bakeries* case emphasizes the language of Mr. Justice Douglas in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972, at page 455 of 353 U.S. and at page 917 of 77 S. Ct.:

> "• • • plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike".

In the present case there was no agreement not to strike. There was a strike for which the collective bargaining agreement contained no governing provisions. The discharges occurred during the strike and because of the strike activity of the dischargees. The broad latitude given to

arbitration clauses under the Lincoln Mills decision and the three Steelworkers decisions is totally inapplicable to these strike incidents because the declared and underlying reason therefor is totally absent here.

This is particularly true in the case at hand because Petitioner is charged with acts constituting unfair labor practices under 29 U.S.C., Sections 157-158 (61 Stat. 140) for which the National Labor Relations Board is peculiarly qualified to fashion remedies.

Under 29 U.S.C. 160 (61 Stat. 146), this Court has often held such jurisdiction of the National Labor Relations Board to be exclusive in a series of cases from *Garner* v. *Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, through *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601. While state courts or state agencies were involved in these cases, and the Supreme Court in the prior appeal of this case declined to review whether the exclusive jurisdiction of the National Labor Relations Board over unfair labor practices preempted the jurisdiction of a private arbitrator under a collective bargaining agreement to adjudicate conduct constituting an unfair labor practice (still a question upon which this Court has never passed), it is certainly correct and conservative to say that this Court has never declared that an arbitration provision in a collective bargaining agreement under the policy of the federal law should be broadly and liberally construed so as to bring the adjudication of unfair labor practices into arbitration. Yet this is precisely the policy and the rule of construction which the Fifth Circuit has followed in this case.

The Fifth Circuit opinion neither finds nor requires an agreement to arbitrate money damage claims based upon unfair labor practices. It directs arbitration because it finds no express prohibition against arbitrating money dam-

age claims based upon strike discharges, for its ultimate holding is stated at page 11 of its opinion (App. 12a):

> "* * * we find no such positive declaration as would exclude from the arbitrators the power to determine whether the award of back pay is or is not within the terms of the agreement, and if so, whether it is or is not an appropriate remedy".

Reaching this sobering result in the teeth of an express contract prohibition against supplementing the agreement in arbitration and in the face of a specific reservation that *all* rights "not herein expressly relinquished are vested exclusively in the Company" is neither required nor supported by the prior decisions of the Supreme Court or by the reasons underlying those decisions.

POINT THREE

The Mere Assertion of a Claim in a Grievance Without Invoking a Contract Provision to Support it does not Establish Arbitrability.

The Court of Appeals opinion holds that the statement (in the written grievance) of a claim for pay for all time lost is alone sufficient to render the money claim arbitrable. It does not require that the grievance invoke a contract provision which is relied upon to support the money claim and about which there is a "difference * * * as to the meaning, application or interpretation" though such is required by Section 2 of Article IV on page 4 of the collective bargaining agreement for an arbitrable grievance. The provisions of the grievance rather than the provisions of the collective bargaining agreement are made determinative of arbitrability.

On page 7 of the Court's opinion (App. 8a) it is asserted:

> "The second aspect was the demand that each be reinstated 'with all rights unimpaired and with pay for all time lost'. This latter facet was an integral part of the controversy over the substantive rights accorded by the collective bargaining agreement. • • • It was, therefore, a 'difference • • • as to the meaning, application or interpretation of the provisions' of the contract • • •".

What provisions of the contract? The Court like the grievant invokes no provision of the contract which is claimed to support a money damage award. It merely invokes a provision of the grievance itself instead of "provisions of this Agreement" relied upon to support the claim for money damages and "as to the meaning, application or interpretation" of which there is a "difference" as is expressly required by Section 2 of Article IV to constitute a "grievance". Only a "grievance" under Article IV is subject to arbitration under Article V (R. 25, p. 6).

Even more inexplicably the Court of Appeals declares on page 11 of its opinion (App. 12a) that "the grievance itself comprehends demands both for reinstatement and back pay so that on its face the controversy is a 'difference • • • as to the meaning, application, or interpretation' of the agreement". This utterly confounding process of equating differences as to the provisions of the grievance with differences as to the provisions of the collective bargaining agreement is not only wholly unsupported by but is in conflict with the applicable decisions of this Court.

In *United Steelworkers of America* v. *American Manufacturing Co.*, supra, specific seniority provisions of the union contract were expressly invoked by the grievant as sustaining his right to reinstatement on the basis of seniority upon his return from a leave of absence resulting from an industrial injury because of which he received a

25% permanent partial disability award under the Workmen's Compensation Law. A difference as to a specific provision and its interpretation and application in the specific case was put in issue. Nothing comparable exists here.

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, supra, the grievants expressly invoked the "no lock-out clause" as prohibiting the contracting out of work by the employer while the employees were laid off.

In each of these cases a specific contract provision was invoked as supporting the grievance. No issue of money damage awards without contract provision therefor was involved. This Court did not invoke the provisions of the grievance in a judicial boot strap operation through which asserting a claim in a grievance establishes its arbitrability. On the contrary, this Court in the last case declared:

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any issue which he has not agreed so to submit".

The only one of the three cases involving the power of arbitrators to award money damages to employees held to be wrongfully discharged was *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, supra, where the contract contained the express provision authorizing money damage awards in such cases which is totally absent here, as follows:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost".

It is the absence here of just such a provision that was present there which puts the issue of money damages here beyond the scope of court compelled arbitration. The quoted provision is just the kind that would have been contained in the carefully prepared 63-page printed contract in the present case if the parties had agreed or intended to agree to any such provision.

POINT FOUR

The Actual Effect of the Court of Appeals Decision Was to Delegate the Determination of Arbitrability to the Arbitrator in Conflict with the Decisions of the Supreme Court.

While purporting to resolve "this threshold legal question of the contract promise" and while paying lip service to the principle that the courts must determine arbitrability, the decision of the Court of Appeals in fact effectively delegated to the Board of Arbitration the determination of whether money damage claims based upon strike discharges are arbitrable under the collective bargaining agreement between Petitioner and Respondent. On page 7 of its opinion (App. 9a), the Court of Appeals stated:

> "Whether the contract does or does not give rise to an obligation on the part of the employer to make good to a wrongfully discharged employee back pay for the time lost is a question of contract interpretation. But that does not make it one for a court to decide".

This holding is based upon a misconception of the arbitration process which fails to perceive that a determination of whether a claim for pay for all time lost can be asserted under the contract is a determination of the issue

of arbitrability, which under the decisions is for the court. It fails to perceive that if arbitrability of the issue is found by the court, then the function of the arbitrator is to decide whether on the merits and under the particular facts of the individual case such money claim should be granted, denied, or allowed in part and refused in part.

This same fundamental misconception is reasserted on page 9 of the opinion (App. 10a) as follows:

> "So far as the term 'supplement' is concerned it cannot be read literally to rule out the right of arbitrators — just as would a court — to find substantive rights, obligations and duties which are implied though not expressed. The alternative to this would make the agreement to arbitrate superfluous for the sole inquiry would then be: Is it expressed in the contract? If not, then to read it into the contract is to 'supplement' it, and this is forbidden".

This holding again totally fails to perceive that the arbitration function is to adjudicate individual cases on their merits and their particular facts under the applicable contract provisions after the arbitrability of the cases has been established by agreement or determined by the courts. Such adjudication of individual cases on their merits is neither a "supplement" to the agreement nor is it "superfluous". On the contrary, it is the heart and soul of the arbitration process in its daily functioning.

The Court of Appeals opinion then asserts that "what substantive matter is thereafter considered to be within or without the express or implied terms of the agreement is a decision for the arbitrators".

Then the opinion moves on page 11 (App. 12a) to its ultimate holding:

> "We find no such positive declaration as would exclude from the arbitrators the power to determine

> whether the award of back pay is or is not within the terms of the agreement, and if so, whether it is or is not an appropriate remedy".

This is the pure and simple delegation of the function and power to determine arbitrability to the arbitrator. It is complete judicial abdication. The court function is rendered "superfluous" and meaningless. The Court of Appeals has not determined whether money damage claims can be adjudicated on their merits in arbitration under the provisions of the agreement. It has left that issue for the arbitrator to decide. It has left it to the arbitrator to decide whether this Petitioner agreed with Respondent to arbitrate money damage actions based on its conduct during a strike. It has left it to the arbitrator to determine the issue of arbitrability. This is contrary to the prior decisions of the Supreme Court. Under those decisions, the Court should determine "whether the award of back pay is or is not within the terms of the agreement", i.e., whether Petitioner has agreed to arbitrate money damage actions based upon strike discharges. If it be judicially determined that the Petitioner has so agreed, then "whether it is or is not an appropriate remedy" on the merits of the individual cases under their particular facts and circumstances and under the applicable contract provisions would be for the arbitrator.

The Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, supra, stated at 363 U.S. 584, 80 S. Ct. 1353 that "the judicial inquiry" is the issue of "whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made". In footnote 7 on the same page the Supreme Court clearly drew the distinction

which the Court of Appeals failed to draw in the present case as follows:

> "It is clear that under both the agreement in this case and that involved in American Manufacturing Co,. 363 U.S. 564, 80 S. Ct. 1343, the question of arbitrability is for the courts to decide. * * * Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose".

The Court of Appeals in the instant case has very clearly and definitely delegated to the arbitrator not only "the decision of the merits of the grievance", i.e., whether money awards for lost time and pay should be granted in full, denied in full, or allowed in part, but also the decision of the issue of whether this Petitioner ever agreed to arbitrate these money damage claims on their merits. The latter question under the decisions of the Supreme Court is for the courts and the decision of the Court of Appeals to the contrary is in conflict with the decisions of other Courts of Appeals on the same matter and is in conflict with the applicable decisions of this Court.

POINT FIVE

The Court of Appeals Erred in Refusing to Follow its own Recent Decision in Refinery Employees Union of Lake Charles Area v. Continental Oil Co.

The District Court in April, 1960, denied court compelled arbitration of the money damage claims of the fifteen discharged strikers on the square authority of the 1959 decision of the Fifth Circuit in *Refinery Employees Union of Lake Charles Area* v. *Continental Oil Co.*, 268 F. 2d 447,

cert. den., November 16, 1959, 361 U. S. 896, 80 S. Ct. 199, 4 L. Ed. 2d 152. In October, 1960 (R. 47), the District Court denied the Respondent's motion to alter, amend, or modify its judgment based upon the three June 1960 Supreme Court decisions in the United Steelworkers cases, thereby finding that these decisions required no different holding and that the *Continental Oil Company* case was still controlling.

The Fifth Circuit has now abandoned and refused to follow its so recent decision in which the Supreme Court has so recently denied writ of certiorari and which the District Court understandably felt compelled to follow. The *Continental Oil Company* case is indistinguishable from our case. The Fifth Circuit's opinion does not attempt to distinguish it. *It held that arbitration of a claim for pay for time not worked would not be ordered when there was no contract provision for such an award.* The *Cameron* case is even a stronger case in support of the same decision because it involves discharges for alleged strike misconduct under a contract containing no provisions regulating the actions of the parties during a strike but containing provisons prohibiting the supplementing of its express terms in arbitration and specifically reserving to the employer all rights not expressly relinquished.

The Continental Oil Company case held that:

> "The District Court correctly limited the arbitrable issue in holding that the parties to the collective bargaining contract did not intend to submit to arbitration the remedy for mis-assignment of overtime work, including authority to award damages for work not performed".

Continental held that the court could "set guideposts for the arbitrators to follow" and "tell the arbitrator what to arbitrate". That is what the District Court did here. It did

so because the law "does not permit the Court to find agreement when there is no agreement". Continental asserted that:

> "The contract is silent as to the remedy, if any, for mis-assigned overtime. The arbitration clause is silent as to the power of arbitrators to provide a remedy or to impose a penalty".

Such is the situation in the *Cameron* case except here additionally there are express provisions prohibiting the implying of remedies or rights which are not expressed. In Continental it was declared that the "real dispute as to whether the Company should pay for time not worked" is a dispute "plainly not covered in the contract — unless — giving a broad interpretation to the arbitration clause, the Court should hold that the authority of an arbitrator to make awards and to fix damages was implied in the arbitration of every grievance". Continental refused to imply any such agreement to arbitrate money damage actions. The Cameron contract expressly prohibits any such implication either by supplementing the agreement in arbitration or by taking away rights exclusively vested in the employer by specific provision of the agreement because not expressly relinquished in the agreement.

The *Continental Oil Company* case seemed to have settled that damage suits will not be tried through compulsory arbitration in the absence of any provision in the union contract for it. The three Steelworkers opinions of June 1960 require no departure from this holding. The District Court followed it. The Court of Appeals should have done so.

CONCLUSION

If there is to be a drastic departure from the *Continental Oil Company* case and a radical extension of the June 1960 decisions in the Steelworkers cases, then certainly it should

not be in a case where court compelled arbitration is sought of money damage actions based on unfair labor practices normally held to be within the exclusive jurisdiction of the National Labor Relations Board. Assuredly it should not be under a collective bargaining agreement which not only contains no provisions on money damage awards or provisions governing the actions and conduct of the parties in the strike during which the discharges occurred but which does contain express prohibitions against supplementing its terms in arbitration and which does expressly reserve to the employer all rghts not specifically relinquished. Otherwise labor arbitration becomes compulsory and authoritarian rather than voluntary and contractual because if the contract language be evaluated in the context of the realities of the collective bargaining process this Petitioner did not conceivably agree to arbitrate or even contemplate the arbitration of either fifteen strike-born unfair labor practice charges or fifteen strike-born damage suits.

It is accordingly urged that a writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT

Extract from the Minutes of June 27, 1961

LODGE No. 12, DISTRICT No. 37

INTERNATIONAL ASSOCIATION OF MACHINISTS

No. 18716 versus

CAMERON IRON WORKS, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, modified in accordance with the opinion of this Court; and as thus modified, that said judgment be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellee, Cameron Iron Works, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18716

LODGE NO. 12, DISTRICT NO. 37
INTERNATIONAL ASSOCIATION OF MACHINISTS
Appellant,

versus

CAMERON IRON WORKS, INC.
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(June 27, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON and BROWN, Circuit Judges.

BROWN, Circuit Judge: We deal here with the question of whether arbitration of a labor dispute pursuant to a collective bargaining agreement may comprehend an award of a money sum equivalent to back pay for time lost due to an unauthorized discharge. The District Court answered it in the negative. We disagree and reverse.

The case is here for the second time. On its former appearance, in there reversing the District Court, we held that a grievance within the terms of the arbitration clause was presented concerning the discharge of 15 employees for misconduct during the preceding strike. *Lodge No. 12, etc.* v. *Cameron Iron Works, Inc.*, 5 Cir., 1958, 257 F. 2d 467, cert. denied, 358 U.S. 880, 79 S.Ct. 120, 3 L.Ed. 2d 110. On remand the Court, without a jury, heard the case. The Employer's effort to establish that in the settlement of the strike the parties had expressly agreed not to arbitrate this controversy having failed,[1] there was nothing left for the Court to do save order arbitration. This it did. But in so doing, the Court expressly directed that the "* * * scope of arbitration, however, may extend only to the issue of reinstatement of the employees and may not include the award of back pay for time lost." The Court presumably had two things in mind. First, since the "* * * grievance sought to be arbitrated is the reinstatement of the employees * * *" such controversy "* * * may be settled by the board upon terms and conditions not necessarily involving the award of back pay." Second, and more important, it held that there "* * * is no clear authority in the contract for the award of back pay as a remedy in arbitration," and "such a remedy cannot be implied from a grant of authority to arbitrate * * *" any difference as prescribed in the collective bargaining agreement. The Judge cited and without a doubt relied heavily on our recent decision in *Refinery Employees Union* v. *Continental Oil Co.*, 5 Cir., 1959, 268

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[1] The Employer strenuously urged the factual defense that as a part of the settlement of the strike it was mutually agreed that reinstatement of strikers would not be subject to arbitration. The Judge held against it on this. The Employer acquiesced in this without taking any cross appeal presumably on the grounds that United Steel Workers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S 574, 80 S.Ct. 1347, 4 L.Ed. 2nd 1409, extinguished whatever hope it might have had for reversal of this issue.

F. 2d 447, cert. denied, Nov. 16, 1959, 361 U.S. 896, 80 S.Ct. 199, 4 L.Ed. 2d 152.

The collective bargaining agreement reflected the mutual purpose of settling "problems or grievances"[2] In contract terms which have been characterized as the standard clause, *United Steel Workers* v. *American Manufacturing Co.*, 1960, 363 U.S. 564 at 565, 80 S.Ct. 1343, 4 L.Ed.2d 1403, the parties bound themselves to arbitrate "* * * any difference * * * between the Company and any employee as to the meaning, application or interpretation of the provisions of" the agreement.[3] Arbitration machinery comprehended the selection of arbitrators and their function,[4] the selection of the

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[2] The contract provided:

"Article IV — Grievance Procedure

"SECTION 1. It is the mutual intent and desire of the Union and the Company that employees make an effort to settle their problems or grievances with their Superior prior to resorting to the Grievance Procedure."

[3] Article IV, see note 2, supra, continued:

"SECTION 2. Should any difference arise between the Company and any employee as to the meaning, application or interpretation of the provisions of this Agreement, such difference may constitute a grievance and shall be settled as follows:

"[(a) through (f) described successive steps] * * *

"(e) If the grievance is not satisfactorily adjusted by the General Manager or his designated representative, then arbitration may be invoked as provided in Article V."

[4] Article V prescribed a Board of Arbitration composed of one member selected by the Union and one by the Company. The Union and the Company had to name their representatives within three days. Section 1 then provided:

"Before proceeding toward selection of the third member of the Board of Arbitration, the two representatives appointed by the parties shall attempt to effect a settlement of the controversy within five (5) days * * *. If it should appear that additional time would be helpful toward effecting settlement, this five (5) day period may be extended by mutual consent of the two representatives. In the event settlement of the controversy is not effected during such period * * * the two representatives shall * * * select the disinterested member * * *." Then follows the method of selecting the third member where the two others cannot agree.

disinterested member, and the powers of the Board of Arbitration so constituted.[5]

After the District Court announced its decision, the Supreme Court handed down the three Steel Workers opinions on June 20, 1960.[6] The Union by timely motion for revision of findings, F.R. Civ. P. 59(e), brought these to the attention of the Trial Court. Presumably the Court considered them of no substantial significance. We think their importance has been too much minimized and without attempting to cast it in terms of the impact of these cases upon our *Continental Oil* case, 268 F. 2d 447, we think these intervening decisions point in a compelling way to a reversal.

The Employer insists in its brief that the 63 printed page contract with its minute details of rates of pay, hours of work, and conditions of employment is a "mundane and specific contract that seeks to spell out the details of the agreement." Consequently, it urges it "is no broad and 'generalized code of industrial self-government'" nor an "ambiguous and amorphous charter to bring into being an undefined 'common law of the shop.'" But this is really no answer.

Of course the terms of the contract, and frequently their very precision will be relevant if not controlling. But the Supreme Court did not find the unique importance of such

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5 Article V, note 4, supra, then continues:

"SECTION 2. The Board of Arbitration shall render a decision within (15) days from the date the hearing is completed. The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties; provided, however, the Board shall have no authority to violate, contravene, disregard or supplement the terms of this agreement."

6 United Steelworkers v. American Manufacturing Co., 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403; United Steelworkers of America v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409; United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424.

contracts either in their brevity or ambiguity. The Court's approach is the one first articulated in *Textile Workers Union* v. *Lincoln Mills*, 1957, 350 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, that §301(a) empowers federal courts to compel arbitration and that "• • • the policy to be applied in enforcing this type of arbitration was that reflected in our national labor laws." 363 U.S. 574 at 577-78.[7] The congressional policy on the settlement of grievances is reflected in §203(d), 29 USCA §173(d). And "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." 363 U.S. 564 at 566. Consequently the run of arbitration cases, e.g., *Wilko* v. *Swan*, 1953, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168, is not relevant. "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife"; and "• • • arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." 363 U.S. 574 at 578. That approach led to the express rejection of the thesis typified by a New York case[8] that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." 363 U.S. 564 at 567. The Supreme Court categorically rejected this as "a principle that could only have a crippling effect on grievance arbitration." 363 U.S. 564 at 566-67.

Of course such factors so broadly declared do not solve the problem automatically. The Courts still have a role. "The Congress, however, has by Section 301 • • • assigned the courts the duty of determining whether the reluctant

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[7] References to the three opinions, note 6, supra, are hereafter made by volume and page citations, without the case styles.

[8] International Association of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 61 N.Y.S. 2d 317, aff'd 297 N.Y. 519, 74 N.E. 2d 464.

party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 363 U.S. 574 at 582. But in resolving this threshold legal question of the contract promise, courts are to be guided by the same overriding consideration. For the Court continues, "• • • the judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. 574 at 582-83.

Viewed in this light several things are clear in the context of this record. At the outset is the nature of the grievance, that is the controversy over which there was a dispute. It covered two things. The first was the claim that each of the 15 men was wrongfully denied reinstatement and hence wrongfully discharged. The second aspect was the demand that each be reinstated "with all rights unimpaired and with pay for all time lost." This latter facet was an integral part of the controversy over the substantive rights accorded by the collective bargaining agreement. It was not a mere dispute over the nature or operation of of the arbitration machinery or the power of the arbitrator. It was, therefore, a "difference • • • as to the meaning, application or interpretation of the provisions" of the contract, see note 3, *supra*.

The District Court apparently undertook to hold that the collective bargaining contract did not extend this sort of relief to one adjudicated by an arbiter to have been wrongfully discharged. But in searching the contract for

"particular language * * * which will support the claim." 363 U.S. 564 at 568, or overcome the claim the Trial Court undertook to perform the function of the arbiter. Whether the contract does or does not give rise to an obligation on the part of the employer to make good to a wrongfully discharged employee back pay for the time lost is a question of contract interpretation. But that does not make it one for a court to decide. "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbiter. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." 363 U.S. 564 at 567-68.

This is all the more true when examined against the very broad language describing the powers of the Board of Arbitration. In sweeping Language which scarcely could be made more comprehensive, the contract provides that "The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties: * * *," see note 5, *supra*. The reference to the "settlement" is neither inadvertent nor insignificant. In the preceding Section 1 of Article V, see note 4, *supra*, the contract charges the two arbiters with the duty of endeavoring to "effect a settlement of the controversy" before naming the disinterested member. What the parties sought by the grievance procedure was something more than adjudication as that term is normally employed. Such contract language is almost a prophetic forecast of the words to come later from the Supreme Court that "* * * the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-govern-

ment. Arbitration is the means of solving the unforeseeable by molding a system of private law * * *." 363 U.S. 574 at 581.

Of course this does not turn the arbiter loose. For "* * * an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. * * *. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. 593 at 597. That means that in arriving at its judgment, that is the "settlement" of the dispute, the Board is under the restraint of the contract which deprives it of any "authority to violate, contravene, disregard or supplement the terms of" the agreement, see note 5, *supra*. To the extent that the meaning and interpretation of this clause is for a court in determining the scope of the promise to arbitrate, we think it means nothing more than this. The Arbitration Board in reaching what is called a "settlement" rather than, say, an adjudication, is not to act as a mediator in working out a new agreement on something not previously covered at all. That is what would result if a "settlement" were forced on the parties which would, as the clause states, "violate" or "contravene" the agreement. So far as the term "supplement" is concerned it can not be read literally to rule out the right of arbitrators — just as would a court — to find substantive rights, obligations and duties which are implied though not expressed. The alternative to this would make the agreement to arbitrate superfluous for the sole inquiry would then be: is it expressed in the contract? If not, then to read it into the contract is to "supplement" it, and this is forbidden.

Once this interpretation of the exclusionary clause is made by the Court, what substantive matter is thereafter considered to be within or without the express or implied terms of the agreement is a decision for the arbitrators.

For this would present a "difference • • • as to the meaning, application or interpretation of the provisions • • •" of the agreement, note 3, *supra*.

From the triumvirate opinions several things seem clear. The merits of the controversy may not be looked to by a court for the purpose of declaring that a correct legal interpretation of the contract would not support the construction sought. This may not be done directly, nor may it be done under the guise of determining that the matter is outside the agreement to arbitrate. "The acceptance of [any such] view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." 363 U.S. 593 at 598-99. It follows that when "• • • the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal." 363 U.S. 564 at 569. Similarly, as to the scope of the arbitration promise itself, the intention to exclude must be clearly expressed. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail • • •. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to pursuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." 363 U.S. 574 at 584-85.

Likewise, whether it is thought to be a part of the substantive right or more a part of the grievance procedure, in the absence of clearly restrictive language, great latitude must be allowed in fashioning the appropriate remedy constituting the arbitrator's "decision." "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. * * *." 363 U.S. 593 at 597. And particularly should latitude in fashioning the remedy be allowed when the grievance itself comprehends demands both for reinstatement and back pay so that on its face the controversy is a "difference * * * as to the meaning, application or interpretation" of the agreement.

Applying these principles to this contract which in a sweeping grant of authority specifies that the "* * * terms and conditions of settlement shall be within the sole discretion of the Board * * *," we find no such positive declaration as would exclude from the arbitrators the power to determine whether the award of back pay is or is not within the terms of the agreement, and if so, whether it is or is not an appropriate remedy.[9]

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[9] It is fundamentally erroneous to approach this as merely a grievance over reinstatement. The controversy involves both reinstatement and back pay under the contract. Each is a substantive matter under the contract. It is not merely a question of what remedy, as such, is permitted for a single substantive claim. "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." 363 U.S. 564 at 567-68.

The whole grievance complaining of wrongful refusal to reinstate and to reimburse the dischargees for back pay is for the Board of Arbitration. The Trial Court's order compelling arbitration should be without the restrictions imposed. In order that arbitration of this 1957 controversy may now go forward, the order is modified by deleting the restriction[10] and as modified, affirmed. 28 USCA §2106.

MODIFIED AND AS MODIFIED AFFIRMED.

HUTCHESON, Circuit Judge, Concurs in the Result.

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[10] "* * * Provided, however, that arbitration in each such grievance shall extend only to the issue of reinstatement and the arbitration decision and award in the case of each grievance shall not include an award of back pay for time lost but shall be limited to the issue of reinstatement."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 433

CAMERON IRON WORKS, INC., *Petitioner*

v.

LODGE NO. 12, DISTRICT NO. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Respondent*

BRIEF OF RESPONDENT

In Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondent accepts Petitioner's Preliminary Statement and Statement of Jurisdiction. The sole statute involved is Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C., Section 185.

Questions Presented

Respondent does not agree with Petitioner's statement of Questions Presented. As Respondent sees it, the correct statement of the question here presented is as follows:

Where the contract expressly provides for the arbitration of discharge cases and further provides that "The terms and conditions of settlement [of arbitration cases] shall be within the sole discretion of the Board" of arbitration, did the Court of Appeals correctly hold that the question of back pay in a discharge is a matter for the arbitrators to decide?

Statement of the Case

The printed collective bargaining contract is attached to the Transcript of Record at page 26. We refer the Court to the pages of this printed booklet as follows:

Article IV, Section 2 provides: "Should any difference arise between the Company and any employee as to the meaning, application or interpretation of the provisions of this Agreement, such difference may constitute a grievance and shall be settled as follows": (Booklet, page 4)

The same Article IV, Section 2, in sub-paragraph (a) provides that a grievance of a discharged employee must be presented within seven (7) days after the employee receives notice of discharge. (Booklet, page 4)

Article V, Section 1, provides that in the event a mutually satisfactory "settlement" of the grievance is not reached through the various steps of the grievance procedure either party may "submit the grievance to the Board of Arbitration." (Booklet, page 6)

Article V, Section 2, reads as follows:

> "SECTION 2. The Board of Arbitration shall render a decision within fifteen (15) days from the date

> the hearing is completed. The terms and conditions of settlement shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties; provided, however, the Board shall have no authority to violate, contravene, disregard or supplement the terms of this agreement." (Booklet, pages 7-8)

The limited function of this Reply Brief is to collate for the convenience of the Court the above relevant contract clauses. This contract expressly delegates to the arbitrators the "sole discretion" to define "the terms and conditions of settlement" of the grievance. What could this language mean except that the arbitrators were empowered by the parties to design an appropriate remedy for the redress ("settlement") where a grievance is found by the arbitrators to have merit? In the case of a wrongfully discharged employee, a most normal remedy to consider is whether to make him whole by granting to him his loss in the form of lost back pay.

Respondent relies upon the able opinion of the Court of Appeals which has correctly applied the three 1960 decisions in the *Steelworkers* cases[1] to the facts of the present case. In applying the law to the facts the Court of Appeals was quite mindful of the necessity for grounding arbitrability upon the terms of the contract as the opinion of the Court plainly shows upon its face.

The exact judgment of the Court of Appeals must be understood. In his final judgment, the District Judge ordered the arbitration of the discharges of the fifteen

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1 Cited by the Court of Appeals in its Footnote 6, Petition, page 6a, and discussed fully in its opinion.

employees (Tr. 35-37). He inserted in his judgment, however, a proviso that:

> ". . . arbitration in each such grievance shall extend only to the issue of reinstatement and the arbitration decision and award in the case of each grievance shall not include an award of back pay for time lost but shall be limited to the issue of reinstatement." (Tr. 37)

The Court of Appeals modified the Trial Court's judgment by striking therefrom the limiting proviso above quoted. (Petition, page 13a)

It can hardly be doubted that the restrictive proviso infringed upon the parties' agreement that the terms and conditions of settlement would be within the sole discretion of the arbitrators. The proviso itself illustrates the error of the District Court because the *reinstatement* provided by the Judge as a remedy is beyond the literal words of the contract. If back pay were beyond the authority of the arbitrators, why would not *reinstatement* also exceed their authority?

Petitioner's principle point is that the contract does not literally *say* back pay or other specific remedy which may be awarded. The contract language broadly fixing the powers of the arbitrator is, of course, a full answer. This is in addition to the rule cited by the Court of Appeals that when an arbitrator is commissioned to interpret and apply the contract he is to bring an informed judgment to bear in order to reach a fair solution of the problem, especially when it comes to formulating remedies. (Petition, page 12a)

On the other hand, Petitioner's contention is quite unrealistic. The broad delegation of powers to the arbitrators in generic terms was a sensible placement of power to adjudge remedial details tailored to the exact case. Petitioner contends, in effect, that the parties delegate no authority unless they employ precise magical words to cover every conceivable detail of remedy. For example, in a discharge case the contract may use no other words but must exactly *say* back pay, or reinstatement, or restoration of seniority, or restoration to the pension plan. It must specify each and every detail which might conceivably arise under the peculiarities of the individual arbitration case.

If the Federal Courts, now placed astradle of collective bargaining contracts, were to commence such a narrow reading of them as Petitioner asks, the task of bargaining the contract in the first instance would become monumental. This is so because the parties instead of settling their bargaining problems in terms of well-stated principles will be put to it to foresee and expressly provide for every picayunish contingency that may arise in the industrial life of the plant.

It is somewhat surprising that so much litigation has been required over such a simple point as is involved in this case. This cause was filed in 1957 and this is the second appeal by this Petitioner to the Supreme Court. See *Lodge No. 12, etc. v. Cameron Iron Works, Inc.* (1958), 257 F. 2d 467, certiorari denied, 358 U.S. 880, 79 S. Ct. 120, 3 L. Ed. 110.

Because the case was rightly decided upon its peculiar facts Respondent respectfully urges that the Petition for Certiorari be denied.

Respectfully submitted,

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Certificate of Service

Service on counsel for Petitioner has been duly made in person on October_____, 1961, which service has been properly certified to the Clerk of the Supreme Court.

CHRIS DIXIE